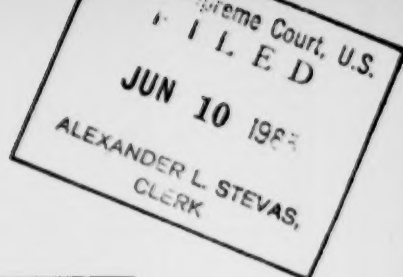


82-2029



Supreme Court Case No. _____

IN THE UNITED STATES SUPREME COURT
October, 1982 Term

BARRY J. FAKIER,

Petitioner,

App. No. 82-5197

vs.

D.C. Docket No.
81-83-CR-T-H

UNITED STATES OF AMERICA,

Respondent.
_____ /

ON PETITION FOR WRIT OF CERTIORARI TO
THE ELEVENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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COUNSEL OF RECORD

and

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QUESTIONS PRESENTED FOR REVIEW

- A. CAN A UNITED STATES CITIZEN BE IMPRISONED FOR SIMPLY COMPLYING WITH A SUBPOENA DUCES TECUM, AS RECORDS CUSTODIAN, WHEN THE RECORD CONTAINS AN UNTRUE STATEMENTS?

- B. CAN A UNITED STATES CITIZEN BE IMPRISONED FOR FALSELY ANSWERING A QUESTION BEFORE A GRAND JURY WHERE A TRUTHFUL ANSWER COULD NOT HAVE CONCEIVABLY AIDED THE GRAND JURY INVESTIGATION?

- C. CAN A DEFENDANT BE LAWFULLY SENTENCED TO CONSECUTIVE PRISON TERMS FOR TELLING THE SAME LIE TWICE?

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REFERENCE TO REPORTS OF OPINIONS

There are no reports of the Orders of the United States District Court, Middle District of Florida or the Eleventh Circuit Court of Appeals in this cause.

STATEMENT OF JURISDICTION

A judgment of guilt against Petitioner was entered and dated February 4, 1982, as to two counts of a five-count indictment. The Petitioner was acquitted as to two additional counts and the fifth count was dismissed on motion of the United States. A timely appeal as a matter of right was taken to the Eleventh Circuit Court of Appeal, resulting in a per curiam affirmance without opinion by Order dated March 3, 1983. Petitioner's Petition for Rehearing was denied by the Eleventh Circuit Court of Appeals by Order dated April 11, 1983.

The jurisdictional basis for this Petition for Certiorari is grounded on this Court's discretionary review by certiorari pursuant to U.S. Supreme Court Rule 17. More specifically, this Court is requested to review:

(1) an issue for which there is no controlling precedent, to wit: what constitutes perjurious "use" of a subpoenaed document before a federal grand jury;

(2) a per curiam affirmance which has the effect of creating a conflict between the Eleventh Circuit Court of Appeals and the Second Circuit Court of Appeals as to the "materiality test" to be applied in federal perjury cases; and

(3) an issue as to whether the Defendant has been illegally sentenced to consecutive prison terms for the commission of a single crime.

STATUTES INVOLVED

§1623. False declarations before grand jury or court.

(a) Whoever under oath (or in any declaration, certificate, verification or statement under penalty of perjury as permitted under Section 1746 of Title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than \$10,000.00 or imprisoned not more than five years, or both.

18 U.S.C.A. §1623

STATEMENT OF THE CASE

The Petitioner was served with a subpoena duces tecum to appear at the United States District Court, Middle District of Florida, Federal Grand Jury Proceeding in February, 1981. (T: 189) Petitioner appeared and testified on March 3, 1981. (TGJ: 1-94) During the course of Petitioner's grand jury appearance, the following colloquy between the United States prosecutor and Petitioner occurred:

"Q Who are the witnesses here?

A That's Lester again and these are the two people in his office."

(R: 23)

Prior to testifying, Petitioner delivered a mortgage to the grand jury purporting to have been witnessed by two persons. Petitioner was indicted by the same grand jury on August 6, 1981, via a five (5) count indictment

alleging in Count I with knowingly using a document containing a false material declaration and in Counts II through V with making a false material declaration under oath to a federal grand jury. (R: 1-14) The false statement of which Petitioner was convicted is the underlined portion of the above quotation wherein two signatures on the mortgages were falsely identified as two people in the notary's office. (R: 129A) The "use" of a false document arose from the mortgage purportedly witnessed by two persons.

The thrust of the grand jury probe was income tax evasion by persons other than Petitioner. Specifically at issue was the authenticity of a note and mortgage executed by the target of the grand jury investigation and whether they represented a true loan by Petitioner to the suspect taxpayer. (T: 165) The petit jury below acquitted the Petitioner

of substantive counts alleging that the loan was a sham and that Petitioner did not have sufficient cash to make such a loan. (R: 112)

A grand jury member, Mark Washabaugh, testified that in the grand jury investigation he believed that the State of Florida required three witnesses on a Mortgage Deed to be valid. (T: 168 and 173) Mr. Washabaugh further testified if the grand jury was taught the law incorrectly, it might have changed their minds as to what facts or factors in their investigation was material to the grand jury probe. (T: 176) Albert Cazin, a specialist in real property law and practicing attorney in the State of Florida (T: 716), testified that in Florida, there is no requirement a mortgage deed be witnessed, but it must be notarized. (T: 720) Herb Sturman, an attorney from California and government witness, stated witnesses on a mortgage deed were superfluous in California

because the document need only to be notarized.
(T: 547)

Lester Spinrad testified that he was an official notary public of the State of California, did properly and lawfully notarize said documents on July 15, 1978 in California (T: 484-488), the date it was executed in his office by Arlene Bykeefer (T: 481, 483), and he did not back-date the Mortgage Deed. (T: 493-494)

Petitioner was never asked in the grand jury proceedings directly if he saw the witnesses sign the Mortgage (T: 833) or if he signed their names. (T: 831) The sole question posed to Petitioner as to the purported witnesses was, "Who are the witnesses here?" (R: 23) Petitioner falsely identified the witnesses as two persons in the notary's office to the grand jury. (R: 23)

Petitioner admitted at trial that he

did, in fact, place the two signatures of Sharon Tompai and Jon Pettey on the Mortgage Deed as witnesses, but he was under the impression that witnesses were not necessary in either the State of California or Florida. (T: 829-830)

Additionally, Petitioner was charged with and convicted of "use" of a false document, to wit: presentation of the mortgage to the grand jury falsely purporting to be witnessed by two persons who did not in fact act as witnesses. (R: 21-23, 112, 129A) It is undisputed that the mortgage was involuntarily produced by service of a subpoena duces tecum. (T: 189)

Petitioner made Motions for Judgment of Acquittal at the end of the Government's case (T: 678) which were denied by the trial court. (T: 705) The Petitioner renewed his Motion for Judgment of Acquittal, after the defense rested, and said Motion was again

denied. (T: 1047-1048)

The Petitioner was found guilty of Counts I and II and sentenced on February 4, 1982 to imprisonment for five years as to Count I and to five years on Count II to be served consecutively. (R: 129-A)

BASIS OF DISTRICT COURT JURISDICTION

Jurisdiction of the United States District Court, Middle District of Florida, was based on a federal question under 18 U.S.C.A. §1623, False declarations before grand jury or court.

ARGUMENT

A. CAN A UNITED STATES CITIZEN BE
IMPRISONED FOR SIMPLY COMPLYING
WITH A SUBPOENA DUCES TECUM, AS
RECORDS CUSTODIAN, WHEN THE
RECORD CONTAINS AN UNTRUE STATE-
MENT?

The Petitioner in this cause finds him-
self imprisoned for up to ten years because
he had the misfortune to be the records custo-
dian of a mortgage securing a debt owed by
a suspect taxpayer. The false statement ap-
peared in the portion of a mortgage which
purported to bear the witness signatures of
Sharon Tompail and Jon Pettey. (R: 21-22)

The applicable statute provides:

"Whoever under oath ... in any
proceeding before ... any ...
grand jury of the United States
knowingly ... uses any information,
including any ... document ...

knowing the same to contain any false material declaration, shall be ... imprisoned not more than five years"
18 U.S.C.A. §1623 (emphasis added)

The compelling questions presented by this Petition are, is a witness "using" a document merely by responding to a valid subpoena? By responding to the prosecutor's questions? Certainly, this cannot be true, otherwise the citizens of this country are faced with a choice between the proverbial rock and a hard place - - punishment for contempt for non-compliance with a subpoena duces tecum, or a conviction for §1623 "use" perjury for compliance with the subpoena.

There is a paucity of caselaw defining or explaining the meaning of the term "use" within the purview of 18 U.S.C.A. §1623. In United States v. Dudley, the Fifth Circuit Court of Appeals left unanswered the question of whether the mere identification of a document constitutes a "use" subjecting the

witness to perjury sanctions. 591 F.2d. 1193 (5th Cir. Fla. 1978). This Petitioner respectfully suggests to this Court that that issue is ripe in the case at bar and, that this issue is important and compelling, not only to the instant Petitioner, but also to the thousands of records custodians who are subpoenaed before grand juries throughout the United States.

For the Court's convenience, Petitioner has excerpted all of the Petitioner's grand jury testimony which relates to the subject mortgage. See, Appendix D. A careful review of this testimony reveals that on each occasion the mortgage was drawn into the colloquy, it was the questioning of the prosecutor which repeatedly brought the mortgage to the forefront.

The material question then is, did the Petitioner "use" the mortgage falsely purported to have been witnessed? The Fifth Circuit

Court of Appeals in Dudley, supra, held that the affirmative presentation of a document to the grand jury, coupled with explicit adoption of its veracity or testimonial reliance on the document would constitute use. United States v. Dudley, supra at 1197. It is clear from the Dudley case that it was the Defendant Dudley who relied on the veracity of the contents of the false document at trial. Such is not the case for Petitioner Fakier. Petitioner simply responded to repeated questions from the prosecutor drawing his attention back to the mortgage. See, Appendix D. Throughout all this questioning, the prosecutor never expressly questioned Petitioner about the admitted falsity contained in the mortgage, to wit: the purported witnesses' signatures.

The procedure utilized by the instant prosecutor necessarily brings to mind this Court's criticism of prosecutorial ineptitude

in questioning in Bronston v. United States. 409 U.S. 352 (1973). The affirmance of a conviction grounded on the prosecutors' lack of acuity in questioning Petitioner squarely conflicts with this Court's decision in Bronston. As shown by Appendix D, the instant prosecutor skirted all around the issue of whether or not the purported witnesses actually witnessed and signed the mortgage; he substantially mis-read their names; he received unresponsive or evasive answers from the Petitioner, and then he simply dropped the ball. This record is totally devoid of any question or even an unsolicited answer as to whether or not the purported witnesses actually witnessed the mortgage. This fact cannot be disputed by the government. Yet despite the undisputed failure of the prosecutor to carry out his duties, the United States has charged, convicted and imprisoned the Petitioner!

In Bronston this Court carefully set forth the responsibilities of prosecutors in grand jury proceedings, even to the point of protecting intentional perjurers:

"We perceive no reason why Congress would intend the drastic sanction of a perjury prosecution to cure a testimonial mishap that could readily have been reached with a single additional question by counsel alert - as every examiner ought to be - to the incongruity of petitioner's unresponsive answer. Under the pressures and tensions of interrogation, it is not uncommon for the most earnest witness to give answers that are not entirely responsive. Sometimes the witness does not understand the question, or may in an excess of caution or apprehension read too much or too little into it....It is the responsibility of the lawyer to probe; testimonial interrogation, and cross-examination, in particular, is a probing, prying, pressing form of inquiry. If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination.

* * *

The burden is on the questioner

to pin the witness down to the specific object of the questioner's inquiry.

* * *

Precise questioning is imperative as a predicate for the offense of perjury.

It may well be that petitioner's answers were not guileless, but were shrewdly calculated to evade ... Nevertheless ... any special problems arising from the literally true but unresponsive answer are to be remedied through the 'questioner's acuity' and not by a federal perjury prosecution." Bronston, supra, at 358, 359, 360, 362; emphasis added.

Before the serious sanction of a perjury conviction should be sanctioned by this Court, it is the government's burden to prove beyond all reasonable doubt that the Petitioner knowingly used that portion of the document containing the false statement. The government should not be permitted a victory by technical knockout either by negligently or intentionally omitting the crucial question and arguing instead that it was the witness' defalcation

of duty which justified the conviction. A conviction resting on the government's own negligence cannot be allowed to stand.

Perjury, whether verbal or non-verbal, is an intentional act, e.g. "whoever ... knowingly" 18 U.S.C.A. §1623. Petitioner Fakier had no duty to disclose to the grand jury information not asked. In order to affirm Fakier's conviction for "use" of a document containing a false statement, this Court must assume that Petitioner would have lied if the appropriate question had been posed. Under the American system of justice, alleged criminals are not "assumed" into prison. United States v. Brumley, 560 F.2d. 1268 (5th Cir. Ga. 1977).

Surely "use" as intended by Congress encompasses something more than responding to a subpoena duces tecum or inept prosecutorial questioning. A criminal statute should be construed narrowly to criminalize only

that conduct which Congress intended. United States v. Dudley, supra at 1197. Even the standard dictionary definition of the term contemplates some intentional act by the "user":

"To make use of, to convert to one's service, to avail oneself of, to employ."
Black's Law Dictionary (4th Edition)

"1. to employ for some purpose; put into service; make use of; ... 2. to avail oneself of; apply to one's own purpose."
The American College Dictionary
(Random House, Inc. 1962)
(emphasis added)

In what way did Petitioner apply the existence of mortgage witnesses "to his own purpose?" In fact, Petitioner, did not initiate any "use" of the mortgage whatsoever. He simply responded to questions posed by the prosecutor about the mortgage. Significantly, the prosecution wholly failed to prove those counts charging that the entire loan transaction was a sham.

If we assume arguendo, that Petitioner did "use" the document in responding to questioning, how does this Statute apply to a document which is false only in part? In Dudley, supra, the document was clearly false in toto. At best, Petitioner's responses held forth that there was in fact a true loan underlying the mortgage. The petit jury apparently agreed. Petitioner was acquitted of participating in a sham loan. When Petitioner was never questioned about the actual witnessing, the only false statement on the document, how can he have been convicted of a perjurious "use" of a document which was otherwise true?

An affirmance of Petitioner's conviction for "use" will create a precedent, at least within the Middle District of Florida, which has the practical effect of creating a heretofore unknown duty on grand jury record

custodian witnesses that they must, after taking the oath, affirmatively disclose any known false statements lurking about in their documents, regardless of the actual questioning, upon penalty of a federal perjury conviction. If this is in fact the opinion of this Court, Petitioner respectfully suggests to the Court that as a matter of due process unwitting grand jury witnesses are entitled to a warning at the commencement of their testimony of the scope of their duty to disclose, and the serious penalty for failure to disclose.

B. CAN A UNITED STATES CITIZEN BE
IMPRISONED FOR FALSELY ANSWERING
A QUESTION BEFORE A GRAND JURY
WHEN A TRUTHFUL ANSWER COULD NOT
HAVE CONCEIVABLY AIDED THE GRAND
JURY INVESTIGATION?

The elements of the offense of perjury or false statements before a grand jury are that the statement must have been false, material and made by the Defendant with knowledge of its falsity. United States v. Dudley, 591 F.2d. 1193 (5th Cir. Fla. 1978). The particular false statement resulting in Petitioner's conviction was the underlined portion of his answer to the following question propounded by the prosecutor:

"Q Who are the witnesses here?

A That's Lester again and these

are two people in his office."*
(R: 23)

The Petitioner admitted at trial having given a false statement to the grand jury.

(T: 829, 830) Accordingly, the issue presented is whether the false statement was material to the particular grand jury investigation.

Materiality is an essential element of the statutory offense which the government has the burden of proving. United States v. Mancuso, 458 F.2d. 275, 280 (2nd Cir. NY 1973). The issue of whether a declaration is material is a question of law to be determined by the Court. United States v. Dudley, supra. The primary test for determining whether a particular false statement is material within the purview of 18 U.S.C.A. §1623 is whether the statement is capable

*The Petitioner was charged only with falsely identifying two of the witnesses' signatures as people in Lester's office. The superceding indictment did not allege "Lester" to be a false witness.

of influencing the grand jury's investigation.
United States v. Dudley, supra.

The grand jury at bar was investigating possible tax fraud by Arlene Bykeefer (the mortgagee in the mortgage described above) and others, and in particular, was investigating whether the loan evidenced by the Fakier-Bykeefer mortgage was a true loan or a sham. (T: 154, 155, 164-167) Under Florida State law, to be valid, a mortgage need only be signed by the mortgagor and acknowledged before a notary public. Fla. Stat. §695.03; Wickes Corp. v. Moxley, 342 So.2d. 839 (2nd D.C.A. Fla. 1977); Windle v. Sebold, 241 So.2d. 165 (4th D.C.A. Fla. 1970). It is abundantly clear from the following testimony, however, that the investigating grand jury improperly believed that the mortgage was invalid unless signed by three witnesses:

"Q What difference would it have made to the grand jury if the

second and third witnesses on there hadn't actually witnessed that document and, indeed, their signatures were forgeries?

A The grand jury would not have believed that the document was legal. In the State of Florida it requires three witnesses. I don't know about California, but Florida is - - requires three witnesses."
(T: 168)

* * *

"Q Now, if statements made to you or things you thought were true were incorrect, would that have changed your determination of what was important and what wasn't important in your investigation?

A If they were incorrect."
(T: 176; emphasis added)

It is clear from the foregoing colloquy that the grand jury was misled as to the importance of the presence or absence of legitimate witnesses on the mortgage, resulting from a clear misapprehension of the law. Assuming a material issue before the grand jury was whether the mortgage was

evidence of a true loan, the existence of witnesses on the mortgage itself was immaterial from a legal standpoint as to the validity of the mortgage.*

The district judge held that the mere identities of the purported witnesses to the mortgage and whether or not they had actually signed the mortgage was material to the grand jury's inquiry as to the loan's validity and authenticity. (T: 701) In so doing, however, the district judge overlooked the second prong of the two-tier test of materiality. In affirming the conviction, the Eleventh Circuit Court of Appeals has created a conflict with the Second Circuit as to the proper test to be used in determining whether a statement is "material" within the purview of 18 U.S.C.A. §1623.

*It should be noted that the Petitioner was wholly acquitted as to those counts alleging that the Petitioner participated in the alleged sham loan. (R: 94)

The inquiry as to materiality does not end with the determination as to whether the answer is capable of influencing the grand jury. The Second Circuit Court of Appeals has held if the statement is found to be capable of influencing the grand jury the trial court is next required to examine the nature of the grand jury's inquiry and the testimony at trial introduced to prove falsity in order to determine whether a truthful answer could conceivably have aided the grand jury investigation. United States v. Mancuso, 485 Fo.2d. 275, 280, 281 (2nd Cir. NY 1973). Materiality does not simply turn on whether the question on its face could conceivably have evoked a material reply. Id. at fn 17, p. 281.

The ultimate issue is, therefore, whether the government has shown that a truthful answer could possibly have assisted the grand jury in its tax evasion investigation

of parties other than Petitioner. In this case, neither the answer the Petitioner gave nor the truth he allegedly concealed, could have impeded or furthered the investigation.

If one examines the false answer given, it is obvious that the answer provided ammunition for further investigation rather than impeding any investigation. By identifying the two witnesses, the Petitioner actually gave the grand jury additional theoretical witnesses to pursue. On the other hand, a truthful answer to the question "who are these people" would have simply been:

"Sharon Tompai is a former girlfriend and Jon Pettey is a friend and former neighbor, however, I signed their names to the mortgage. They were not present."

No additional leads would have resulted from this information; no new witnesses would have been revealed. In other words, the government in this cause has wholly failed to prove that

the Petitioner's false statement was material, i.e., that a truthful answer such as set forth above could have assisted the grand jury investigation. Accordingly, under the Mancuso test, the false statement was not "material," and the Petitioner's pretrial Motion to Dismiss the Indictment and Rule 29 Motion for Judgment of Acquittal as to Count I should have been granted, as a matter of law. Petitioner respectfully suggests to the Court that the proper test of materiality is that of the Second Circuit in Mancuso, and that the inherent conflict created by the Eleventh Circuit affirmance of Petitioner's conviction must be resolved by reversal of Petitioner's conviction.

Since both the verbal perjury and the non-verbal "use" perjury arise from the misidentification of the witnesses to the mortgage, the failure of the government to prove

that "materiality" of these false statements mandates that both counts must fail as a matter of law, and Petitioner's conviction be reversed in toto.

C. CAN A DEFENDANT BE LAWFULLY SENTENCED
TO CONSECUTIVE PRISON TERMS FOR TELLING
THE SAME LIE TWICE?

The Petitioner was convicted of two counts of violating 18 U.S.C.A. §1623 and sentenced to two consecutive five-year prison terms for those convictions. Nevertheless, Petitioner contends that the act giving rise to Petitioner's conviction for false testimony and use of a document containing a false declaration is a single act, and accordingly, Petitioner should only be subject to a single punishment.

Multiplicity is defined as the charging of a single offense in more than one count.

Count I charged Petitioner as follows:

"4. At the time and place aforesaid, BARRY J. FAKIER, while under oath before the Grand Jury, knowingly used a document, namely an alleged mortgage deed purporting to have been executed on July 15,

1978, between Arlene Bykeefter, as mortgagor, and BARRY J. FAKIER, as mortgagee, securing \$250,000 in funds, knowing the same to contain a false declaration, to wit: that Sharon Tompai and Jon Pettey (sic) had witnessed by their own signatures the mortgage deed as signed, sealed and delivered in their presence, whereas, BARRY J. FAKIER then well knew and believed, Sharon Tompai and Jon Pettey (sic) had not been present and had not placed their signatures on the document as witnesses."

(R: 21, 22)

Count II of the Superceding Indictment charged
Petitioner as follows:

"4. At the time and place afore-said, BARRY J. FAKIER, during the course of his testimony and while under oath before the Grand Jury, knowingly made a false declaration, as follows: (False declaration is underlined)

* * *

Q Who are the witnesses here?

A That's Lester again and these are two people in his office."

(R: 22, 23)

It is clear from the foregoing allegations


that Petitioner's conviction on each count results from the single act of presumably identifying Sharon Tompai and Jon Pettey as actual witnesses to the execution of the mortgage. The fact that the government has couched one count in terms of use of a written false declaration and the other in terms of a verbal mis-identification does not avoid the problem of multiplicity. It clearly would have been improper for the government to bludgeon a lying grand jury witness by repeating and rephrasing the same question so as to create additional perjury charges. United States v. de la Torre, 634 F.2d. 792 (5th Cir. Tex. 1981). The Fifth Circuit Court of Appeals pointed out in United States v. Dudley, supra, the potential problem as to whether using a false document and testifying falsely as to its authenticity would constitute in fact only one crime, but left the question

unanswered as the defendant in Dudley had been sentenced to only one sentence or concurrent sentences. United States v. Dudley, supra. Once again a question left unanswered in Dudley is ripe for determination in the case at bar, as it is clear that this Petitioner has been sentenced to two consecutive terms for the same alleged criminal act, to wit: the mis-identification of Sharon Tompai and Jon Pettey as witnesses. As noted in Dudley, the appropriate remedy where multiplicitous indictments result in accumulative sentences, is to remand the case to District Court for dismissal of one count. Accordingly, even if this Court finds that the false statements given or used were material and that Petitioner affirmatively "used" a false document, the judgment should be reversed for imposition of a maximum penalty of five years.

WHEREFORE, Petitioner prays that the
Court will grant his Petition for Certiorari.

Respectfully submitted,


LIMA & ELLIOTT


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for Certiorari was furnished by U.S. Mail this 10th day of June, 1983 to Stephen S. Cowen, Assistant U.S. Attorney, Room 410, 500 Zack Street, Tampa, FL, 33602 and to Lawrence Scott, 625 Twiggs Street, Suite 202, Tampa, FL, 33602, and three copies of the Petition for Certiorari was furnished to the Honorable Rex Lee, Solicitor General of the United States, Department of Justice, Washington, D.C. 20001.

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APPENDIX A

United States District Court For
MIDDLE DISTRICT OF FLORIDA - TAMPA

United States of America vs.

_____)
Defendant)
_____) / BARRY J. FAKIER /

Docket No. /81-00083-Cr-T-H/

JUDGMENT AND PROBATION/COMMITMENT ORDER

_____) In the presence of the
) attorney for the government
) the defendant appeared in
) person on this date
)
)

Month	Date	Year
02	04	1982

)
Counsel) / / WITHOUT COUNSEL However the
) court advised defendant of
) right to counsel and asked
) whether defendant desired to
) have counsel appointed by the
) court and the defendant there-
) upon waived assistance of
) counsel.
)
) / / WITH COUNSEL / Lawrence Scott
) & Albert Lima, Esq. /
_____) (Name of counsel)

_____) /__/ GUILTY, and the court being
) satisfied that there is a
Plea) factual basis for the plea,
)
) /__/ NOLO CONTENDERE,
)
_____) /XX/ NOT GUILTY

_____) There being a verdict of
)
) /__/ NOT GUILTY. Defendant
) is discharged
)
) /XX/ GUILTY.
)
Finding &) Defendant has been convicted as
Judgment) charged of the offense(s) of while
) under oath before the Grand Jury,
) did knowingly used a document,
) namely an alleged mortgage deed
) purporting to have been executed on
) July 15, 1978 knowing the same to
) contain a false material declara-
) tion, to wit: That mortgator's
) had witnessed by their own signa-
) tures the mortgage deed as signed,
) sealed, and delivered in their
) presence, whereas mortgagor's had
) not been present and had not
) placed their signatures on the
) documents as witnesses, in viola-
) tion of Title 18, United States
) Code, Section 1623, as charged in
_____) Counts 1 and 2 of the indictment.

_____)The court asked whether defendant
)had anything to say why judgment
)should not be pronounced. Because
)no sufficient cause to the contrary
)was shown, or appeared to the court,
)the court adjudged the defendant
)guilty as charged and convicted and
)ordered that: The defendant is
Sentence)hereby committed to the custody of
Or)the Attorney General or his author-
Probation)ized representative for imprison-
Order)ment for a period of FIVE (5) YEARS
)as to Count 1, and FIVE (5) YEARS
)as to Count 2, sentence imposed as
)to Count 2 shall run consecutively
)with sentence imposed as to Count 1,
)or until the defendant is otherwise
)discharged as provided by law.

Special)
Conditions)
Of)
Probation)

Additional)In addition to the special conditions
Conditions)of probation imposed above, it is
of)hereby ordered that the general
Probation)conditions of probation set out on
)the reverse side of this judgment
)be imposed. The Court may change
)the conditions of probation, reduce
)or extend the period of probation,
)and at any time during the probation
)period or within a maximum probation
)period of five years permitted by
)law, may issue a warrant and revoke
)probation for a violation occurring
)during the probation period.

)

Commitment)The court orders commitment to
Recommendation)the custody of the Attorney
General and recommends,

)
)
)
)
)It is ordered that the Clerk
)deliver a certified copy of this
)judgment and commitment to the
)U.S. Marshal or other qualified
)officer.

Signed By

/___/ U.S. District Judge

/___/ U.S. Magistrate

/s/

WM. TERRELL HODGES

Date February 4, 1982

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5197

D.C. Docket No. 81-83-CR-T-H

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

BARRY J. FAKIER,

Defendant-Appellant.

Appeal from the United States District Court
For the Middle District of Florida

(March 3, 1983)

Before GODBOLD, Chief Judge, and KRAVITCH,
Circuit Judges, and MORGAN, Senior
Circuit Judge.

PER CURIAM: AFFIRMED. See Circuit Rule 25.

ISSUED AS MANDATE: APR 26 1983

APPENDIX C

Order, dated April 11, 1983, is not available. See Motion for Extension of Time.

APPENDIX D

Excerpts re: "USE" Evidence

Defendant's Grand Jury Testimony*

"Q Now, have you brought with you any documents to this Grand Jury?

A Yes, sir, I have. (TGJ-p.4, lines 20, 21)

* * *

"Q ...And then attached to it is a mortgage deed which says it is executed July 15, 1978 by Arlene Bykefer, the mortgagor, to Barry J. Fakier, the mortgagee.

The documentary stamp shows that this mortgage deed was not filed until October 12, 1979; is that correct? (TGJ-p.5, lines 16-20)

A That's correct, sir. (TGJ-p.5, line 21)

Q Although it is dated July 15, 1978; is that correct? (TGJ-p.5, lines 22, 23)

A That's correct. (TGJ-p.5, line 24)

* * *

*The symbol "TGJ" refers to the transcript of the Defendant's grand jury testimony.

"Q ...Now, these are all the documents you have that are responsive to that subpoena; is that correct? (TGJ-p.7, lines 13, 14)

A Yes, sir. (TGJ-p.7, line 15)

* * *

"Q Can you tell me from these documents what the date was that you met them? The precise date? (TGJ-p.16, lines 12, 13)

A I would have met Arlene on three occasions, July of 1978, December of 1978, February of 1979; and then I met Jerome in September of 1979. (TGJ-p.16, lines 14-16)

* * *

"Q All right, what happened there? (TGJ-p.21, line 10)

A She presented me with the mortgage that you have here, this exhibit, and the note. (TGJ-p.21, lines 11, 12)

Q Will you show me which documents, please, she showed you? (TGJ-p.21, lines 13, 14)

A Certainly, this was in there; this was there; and this was there. (TGJ-p.21, lines 15, 16)

* * *

"Q And she also presented you with a mortgage deed dated July 15, 1978 between herself and you.

A That's correct. (TGJ-p.22, lines 4-6)

* * *

"Q ...Now, the mortgage is dated July 15, 1978; is that correct?

A That is correct. (TGJ-p.25, lines 18-20)

* * *

"Q How were you ever going to establish if she wanted to say that you never had loaned her the money? How were you going to establish she had received it since you were dealing in currency and not in checks? (TGJ-p.27, lines 24, 25; p.28, lines 1, 2)

A Well, she had already signed the mortgage deed, notarized in the State of California, that she had received the money. (TGJ-p.28, lines 3-5)

* * *

"Q All right.

A He represented himself as Arlene's attorney and said that he would personally guarantee me that the last \$35,000 would not be given

to Arlene until he had the satisfaction of mortgage. And that's why my document's not filed until October. Because I could have filed it in July but I hadn't given the last document - - I hadn't given - - I beg your pardon. I hadn't given her the last payment.

Q You say your document. You mean your mortgage - -

A My mortgage.

Q - - wasn't filed until October of 1979 even though it had been executed in July of 1978.

A That's correct, sir.

Q What security did you have between those two dates that you would ever get your money back since you had not filed your mortgage?

A Well, I had a notarized mortgage deed - - (TGJ-p.29, lines 7-24)

* * *

"Q Did he discuss with you the explanation for the more than one year gap in filing the recorded - - in filing the mortgage? Did he discuss with you the explanation for that?

A Well, I had the document.

Q All right.

A It was in my possession. I'm the one that held back the filing until the final payment was made. And as I told you, it wasn't made in July, it wasn't made until September, pending getting Mr. Sutton's satisfaction of mortgage. (TGJ-p.35, lines 1-6)

* * *

"Q If I go ahead and have this paper analyzed, I am going to be able to find out the paper was paper that was manufactured in 1978, not in 1979, I assume?

A I am sure you will, sir.

Q Because it was signed in 1978, like you testified; is that correct?

A That's correct, sir.

Q July, 1978.

A Yes, sir.

Q It wasn't all made up in September of 1979 or around then and then filed right after it was all made up?

A No, sir.

Q And it was Jerome Pratt who handed you what documents in September of 1979? Anything? Did he give you

any documents?

A No, sir. He picked up the \$35,000.
(TGJ-p.80, lines 9-24)

* * *

"Q On this note for \$25,000, that's
Arlene Bykeefer's name over on the
right-hand side - -

A Yes, sir.

Q - - Looks like her signature.
What's the signature on the left-
hand side?

A That's Lester Spinrad, the same
person that notarized the document.
- - That's also his signature.

Q Who are the witnesses here?

A That's Lester again and these are
two people in his office.

Q Sharon Pompai and it looks like
Tom Petty.* You don't know who
they are? Those are people in
Mr. Spinrad's office, is that
correct?

A You know how you get things wit-
nessed in a Notary Public's office."
(TGJ-p.84, lines 16-25; p.85, lines
1-5)

*Actually the names signed were Sharon Tompai
and Jon Petty.

No. 82-2029

Office: Supreme Court, U.S.

FILED

AUG 29 1983

ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

BARRY J. FAKIER, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE

Solicitor General

STEPHEN S. TROTT

Assistant Attorney General

LOUIS M. FISCHER

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QUESTIONS PRESENTED

1. Whether petitioner's presentation of, and testimony concerning, a mortgage deed containing a false material statement constituted "use" of the document within the meaning of 18 U.S.C. 1623.
2. Whether petitioner's false statements were material.
3. Whether the district court erred in imposing cumulative sentences on petitioner for making a false statement and for using a document containing a false declaration.

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*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The judgment order of the court of appeals (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 1983. A petition for rehearing was denied on April 11, 1983 (Pet. App. C). The petition for a writ of certiorari was filed on June 10, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 1623(a) provides:

Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses

any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of using a document containing a false material declaration in a proceeding before a grand jury, in violation of 18 U.S.C. 1623, and one count of making a false material statement to a grand jury, in violation of 18 U.S.C. 1623.¹ He was sentenced to consecutive terms of five years' imprisonment on each count. The court of appeals affirmed without opinion (Pet. App. B).

1. The evidence at trial showed that in March 1981 petitioner testified before a federal grand jury investigating possible tax fraud by Arlene Bykeefeer, her husband Clark Dean, and their lawyer Jerome Pratt. Petitioner was summoned so that the grand jury could determine whether a purported \$235,000 loan he had made to Bykeefeer, secured by a mortgage deed, was genuine.

Prior to petitioner's appearance, IRS Agent David Siegwald advised the grand jury that the targets of the investigation were believed to have been involved in drug smuggling and had increases in their assets and expenditures that were not explained by their reported incomes. He also told the grand jury that public records showed that Bykeefeer had received a \$200,000 loan from petitioner, and that By-Gil, Inc., a company Bykeefeer owned, had purportedly received

¹Petitioner was acquitted on two other counts of making false statements to the grand jury. The jury was unable to agree on a verdict on a third such count, and the government later moved to dismiss that count.

a \$40,000 loan from Katherine Shymanski. Agent Siegwald explained that a bona fide loan did not constitute taxable income but that a sham loan could be used to disguise taxable income (12/2/80 G.J. Tr. 3-11).²

On March 3, 1981, petitioner testified before the grand jury under a grant of immunity (Tr. 108). He presented a note, dated July 15, 1978, reflecting a \$235,000 loan he had made to Bykeefer. Attached to the note was a mortgage deed, also dated July 15, 1978, but not recorded until more than a year later (Gov. Exh. 2 at 5-6). Petitioner testified that he had made the loan as a result of inquiries from Ed Carter, a Florida businessman, who had told him that Jerome Pratt was seeking \$200,000 to be used to finance a client's expansion of a home on Tampa Bay. When petitioner told Carter that he was interested in such an investment, Carter arranged for Bykeefer to fly to California to meet petitioner and sign the necessary documents (*id.* at 17-18, 20).

According to petitioner, he met with Bykeefer in Los Angeles on July 15, 1978. After they agreed to the terms of a loan, petitioner contacted a long time business associate who was to notarize the documents (Gov. Exh. 2 at 21-22, 24). Once the documents were notarized, petitioner gave Bykeefer a suitcase that contained \$100,000 in cash (*id.* at 25-27). Petitioner testified that he made similar cash payments, in amounts of \$50,000 on two occasions and \$35,000 the third time, in December 1978, February 1979, and September 1979 (*id.* at 27-29). He claimed that the loan funds came from a cash hoard he had accumulated in an effort to conceal his assets from his second wife (*id.* at 41-47, 53-62,

²"G.J. Tr." refers to transcripts of grand jury testimony. Agent Siegwald's testimony was introduced at trial outside the presence of the jury and was used by the trial court in ruling on the materiality of petitioner's statements before the grand jury.

68-69, 73-74, 76-77). However, petitioner testified that Bykefer repaid the loan by check on a monthly basis (*id.* at 71).

In his testimony before the grand jury, petitioner denied that the mortgage deed and note had been backdated (Gov. Exh. 2 at 80; Pet. App. D). When he was asked to identify the witnesses' signatures that appeared on the deed, petitioner identified the signature of the notary and stated that the other two signatures on the deed were those of two persons in the notary's office (Gov. Exh. 2 at 84-85; Pet. App. D). However, at trial petitioner admitted that he had forged those two signatures, using the names of his former girlfriend and a neighbor (Tr. 826-830, 996-998). The two persons whose names petitioner had forged — Sharon Tompai and Jon Pettey — testified at trial that they had not witnessed the signing of the deed. In addition, they testified that after they had received grand jury subpoenas each separately contacted petitioner, who told them that he had signed their names because he needed extra witnesses (Tr. 421-424, 439-444).³

2. Petitioner's defense at trial was that his false statements concerning the witnesses to the deed were not material to the grand jury inquiry because Florida law does not require that a mortgage deed be witnessed. The district court rejected this claim, noting that it was significant to the grand jury to determine the authenticity of the deed and that the identity of the purported witnesses and whether they had in fact witnessed the document would be relevant to that inquiry, regardless of whether such witnesses were required as a matter of state law (Tr. 701).⁴

³Tompai and Pettey were subpoenaed by the grand jury after petitioner's March 1981 grand jury appearance (Tr. 446, 652-653).

⁴See also Sent. Tr. 28-29 ("Sent Tr." refers to the transcript of petitioner's sentencing).

ARGUMENT

Petitioner concedes that his grand jury testimony concerning the witnesses to the deed was false. However, he contends that he did not "use" the mortgage deed within the meaning of 18 U.S.C. 1623 and that his statements were not material. He also contends that the district court erred in imposing consecutive sentences for the two counts on which he was convicted. These contentions are without merit. The rulings of the courts below are correct and do not conflict with the decision of any other court of appeals. Accordingly, further review is unwarranted.

1. Petitioner contends (Pet. 11-21) that he did not "use" the mortgage deed before the grand jury, but rather simply responded to the prosecutor's questions about it, and that his conduct therefore does not fall within the scope of 18 U.S.C. 1623. Petitioner primarily relies (Pet. 12-14, 19-20) on *United States v. Dudley*, 581 F.2d 1193 (5th Cir. 1978), in explaining his contention. But that case supports the decision below. In *Dudley*, a grand jury witness was shown four consulting contracts, one of which was a sham. She told the grand jury that those contracts were the only ones she had signed. After her grand jury appearance, the witness's attorney produced the true contract in place of the sham one about which the witness had testified. The witness contended that she did not "use" the document within the meaning of 18 U.S.C. 1623, because she did not physically present it to the grand jury, but merely responded to questions about it. 581 F.2d at 1197. The court rejected that contention, finding that physical presentation is not necessary so long as a witness falsely authenticates a document and tends to give verity to it. *Id.* at 1197-1198.

Here it is even clearer than in *Dudley* that there was "use" of the document in the grand jury proceeding. Petitioner presented the document in question to the grand jury, described the execution of the document, and referred to it repeatedly in answering questions about the loan to Bykefer (see Pet. App. D). Petitioner himself was a key participant in the transaction reflected by the document and thus was clearly not a mere "records custodian." In attempting to convince the grand jury that the loan was genuine and that all parts of the mortgage deed were in order, although he in fact had forged the purported witnesses' signatures, petitioner clearly "used" a document containing a false declaration within the meaning of the statute. See *United States v. Dudley, supra*; *United States v. Pommerening*, 500 F.2d 92, 98 (10th Cir.), cert. denied, 419 U.S. 1088 (1974).

2. Petitioner also contends (Pet. 22-30) that his false statement concerning the "witnesses" was not material because the statement could not have influenced the grand jury's inquiry. As the district court observed (Sent. Tr. 28), that claim is specious in light of the record.

The grand jury was investigating the genuineness of petitioner's loan to Bykefer. The validity of the mortgage deed was relevant to that determination because the deed was the only documentary evidence of the date of the purported loan. Petitioner's false answer clearly had the capacity to frustrate the grand jury's inquiry, since the presence on the deed of signatures of supposedly disinterested witnesses tended to confirm its validity.

In fact, petitioner appears to concede (Pet. 26-27) that his statements were within the scope of the grand jury's inquiry and had the capacity to affect it. He nonetheless contends (*id.* at 27-28) that his false statements were not material because truthful answers would not have aided the grand jury's investigation. But petitioner ignores the fact that if he

had testified truthfully that he had forged the witnesses' signatures, the grand jury would have had more reason to doubt the validity of the deed and might well have chosen to question other witnesses about the loan and to pose additional questions to petitioner.⁵ Thus, petitioner's false statements clearly were material. See *United States v. Ostertag*, 671 F.2d 262, 264-265 (8th Cir. 1982); *United States v. Cosby*, 601 F.2d 754, 756 (5th Cir. 1979).⁶

3. Finally, petitioner contends (Pet. 31-34) that the district court erred in imposing consecutive sentences because his false declaration before the grand jury and use of a document containing a false declaration constituted a single act. This contention is without merit. The false use count (Count I) was addressed to petitioner's use of a document containing a false declaration that Tompai and Pettey had witnessed the deed. The false statement count (Count II) was addressed to petitioner's false answer that the "witnesses" worked in the notary's office. Different evidence was used to prove the two offenses. The first count was proved by reference to petitioner's statements about the manner in which the deed had been executed, while the second was proved by reference to his statements identifying the "witnesses." Cumulative sentences are clearly permissible under such circumstances. See *United States v. Molinares*, 700 F.2d 647, 653 (11th Cir. 1983); *United States*

⁵A grand juror testified at trial that, because the grand jury was investigating the authenticity of petitioner's loan to Bykeefer, the existence of the two witnesses to the deed was relevant to the grand jury's inquiry into backdating of the loan documents (Tr. 164-165, 169, 173).

⁶*United States v. Mancuso*, 485 F.2d 275 (2d Cir. 1973), on which petitioner relies (Pet. 27), does not support his contention. *Mancuso* merely held that the test for determining materiality is whether a "truthful answer could conceivably have aided the grand jury investigation." 485 F.2d at 281 & n.17. Because a truthful answer by petitioner could have led the grand jury to make further inquiries about the loan, the decision in this case is consistent with *Mancuso*.

v. *De La Torre*, 634 F.2d 792, 795 (5th Cir. 1981); *United States v. Williams*, 552 F.2d 226, 228 (8th Cir. 1977).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorney

AUGUST 1983